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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 690

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY, AS EXECUTOR OF THE ESTATE OF ALFRED N. SEVERIN, DECEASED, AND AS SUCH AUTHORIZED LIQUIDATOR OF THE BUSINESS OF NILS P. SEVERIN AND ALFRED N. SEVERIN, BOTH DECEASED, FORMERLY COPARTNERS DOING BUSINESS UNDER THE STYLE OF N. P. SEVERIN COMPANY.

Petitioner,

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

HARRY D. RUDDIMAN,
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Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinion below	1
Jurisdiction	2
Questions presented	2
Contract provisions involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	5
Conclusion	9

Table of Cases Cited

Continental Illinois National Bank et al. v. *United States,* 112 C. Cls. 563	7, 8
Hamilton Shoe Co. v. *Wolf Brothers,* 240 U. S. 251	7
Pearson, Dickerson, Inc. et al. v. *United States,* 115 C. Cls. 236	7
Severin v. *United States,* 99 C. Cls. 435, cert. den. 322 U. S. 733	6
James Stewart & Co. v. *United States,* 105 C. Cls. 284	7
United States v. *Blair,* 321 U. S. 730	4, 5
United States v. *Carver,* 260 U. S. 482	7

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THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on January 8, 1952.

Opinion Below

The opinion of the United States Court of Claims (R. 118-124) is not yet officially reported.

Jurisdiction

The judgment of the United States Court of Claims was entered on January 8, 1952 (R. 125). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

Question Presented

Whether, under a contract with the United States, a prime contractor may recover in behalf of his subcontractor losses incurred by the latter as a result of the Government's breach of contract where the prime contractor has not reimbursed the subcontractor for such losses and is not liable for such losses under the subcontract but has agreed to pay the subcontractor such damages as may be recovered in his behalf.

Contract Provisions Involved

The prime contract with the United States is in the standard form of Government construction contract (R. 89-90, R. 111-112).

The subcontract contained the following provision (R. 110):

> 23rd. The contractor or subcontractor shall not in any event be held responsible for any loss, damage, detention or delay caused by the owner or any other subcontractor upon the building; or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, or by any other cause beyond the control of contractor or subcontractor, or in any event for consequential damages.

Statement

This litigation grows out of the performance of a contract for the building of a housing project for the Government. The contractor was a partnership and petitioner

is the legal representative of the partners, both of whom are deceased. The contract included the construction of 42 apartment buildings and a central heating plant consisting of a boiler house and stack (R. 80-81).

The excavation and grading work was subcontracted to W. J. Redmond and A. J. Collier, the subcontract containing the following provision:

> 23rd. The contractor or subcontractor shall not in any event be held responsible for any loss, damage, detention or delay caused by the owner or any other subcontractor upon the building; or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, or by any other cause beyond the control of contractor or subcontractor, or in any event for consequential damages (R. 109-110).

Respondent caused several delays in the performance of the contract work, the principal delay being in connection with the boiler house and stack. On October 17, 1935, respondent directed the contractor to cease work on the boiler house until a redesign of this building was prepared, and followed this with a written stop order on October 23, 1935. No work could be performed on the boiler house or stack until April 15, 1936, 175 days later, when respondent finally directed the prime contractor to proceed with the work in accordance with revised drawings (R. 102-104). It was not reasonable for respondent to take more than 40 days in redesigning the boiler house (R. 108). The United States Court of Claims held that taking 175 days to redesign the boiler house was a breach of contract, that not more than 40 days was a reasonable time for the redesign, and awarded the prime contractor damages in the sum of $28,051.65 based upon 135 days of unreasonable

delay attributable to respondent in connection with the redesign of the boiler house (R. 121).[1]

The subcontractor, Redmond and Collier, was delayed approximately 182 calendar days for the period that the changes in the boiler house and stack foundation were under consideration from October 17, 1935 to April 15, 1936, and incurred increased costs for such 182 days at the rate of $133.66 per day. They demanded payment of their increased costs from the prime contractor who did not pay them. The petitioner has agreed that any amount recovered in this suit because of the subcontractor's increased costs, less a proper amount for attorneys' fees and expenses, will be paid to the subcontractor (R. 110). The United States Court of Claims held that petitioner was not entitled to recover these increased costs in behalf of the subcontractor, a majority of the Court being of the opinion that respondent was not liable for such losses because the prime contractor in turn was not liable under the terms of the subcontract. Judge Madden and Judge Howell took a contrary view, relying on the decision of this Court in *United States* v. *Blair*, 321 U. S. 730, 737-738, (R. 122-123).

Specification of errors to be urged

The Court of Claims erred:

1. In holding that because the prime contractor was not liable under a subcontract to the subcontractor for losses incurred as a result of the Government's breach of the prime contract, petitioner could not recover such losses in behalf of the subcontractor.

2. In failing to hold, in accordance with *United States* v. *Blair*, 321 U. S. 730, 737-738, that petitioner could re-

[1] The United States Court of Claims also allowed recovery on certain other claims not pertinent to this petition which brought the total recovery awarded by that Court to $41,706.40 (R. 118-124).

cover in behalf of the subcontractor, losses incurred by the subcontractor as a result of the Government's breach of the prime contract whether or not petitioner was liable to the subcontractor for such losses under the terms of the subcontract.

3. In failing to give judgment to the petitioner, in behalf of the subcontractor, Redmond and Collier, for the losses incurred by said subcontractor as a result of respondent's breach of the prime contract.

Reasons for Granting the Writ

1. The decision of the Court below is in conflict with the decision of this Court in *United States* v. *Blair,* 321 U.S. 730, 737-738. There, the Government superintendent wrongfully required the subcontractor for tile and marble work to employ skilled labor instead of semi-skilled labor for certain parts of this work, thereby increasing the subcontractor's costs. This Court permitted the prime contractor to recover the increased costs incurred by the subcontractor as a result of the Government's breach of contract, stating that the prime contractor was the only person legally bound to perform his contract with the Government, that he was entitled to recover from the Government the contract price for the tile and marble work whether that work was performed by himself or his subcontractor, and that this necessarily implied the right to recover extra costs wrongfully demanded by the Government whether such costs were performed by the prime contractor or the subcontractor. Nowhere does the opinion suggest that the prime contractor had to prove liability by himself to the subcontractor in order to recover such losses. On the contrary, this Court permitted recovery despite the fact, as stated in the opinion, that the Court below made no finding, and the subcontract did not expressly indicate, that the prime con-

tractor was liable to the subcontractor for the Government's wrongful acts.

Since, from the *Blair* decision it is clear that the prime contractor need not prove liability to his subcontractor in order to recover damages incurred by the latter as a result of the Government's breach of the prime contract, the decision of the majority of the Court below denying recovery in the present case because there was no such liability, is in conflict with the Blair decision.

Moreover, there is nothing in the language of the subcontract provision involved in this case which purports to release the Government from liability for losses it may cause the subcontractor, or to release the prime contractor from its obligation to present to the Government claims for such loss on behalf of the subcontractor. Here the prime contractor has clearly recognized such obligation by suing the Government for the losses it caused the subcontractor and by agreeing to pay to the subcontractor any amount recovered in its behalf. Indeed, to have refused to prosecute the claim for the subcontractor's losses might well have rendered the prime contractor liable to the subcontractor.

2. In any event, the decision of this Court in the *Blair* case, *supra,* followed shortly by the denial of certiorari in *Severin* v. *United States,* 322 U.S. 733, has given rise to uncertainty on the part of the Court below which should be resolved by this Court. In the *Severin* case the Court of Claims, on May 3, 1943, held that a prime contractor, because of a subcontract provision identical with that in the present case, was barred from recovering damages in behalf of his subcontractor for delay caused by the Government. 99 C. Cls. 435, 443-444. The prime contractor filed a petition for certiorari shortly after the petition for certiorari was filed in the *Blair* case, *supra.* No action was taken by this Court in the *Severin* case until May 1, 1944, when it denied certiorari three weeks after its decision

in the *Blair* case, *supra*. Since that date the Court of Claims, or at least a majority of that Court, appear to have treated the denial of certiorari in the *Severin* case as an approval of that Court's decision, and have refused to allow recovery of damages in behalf of a subcontractor where the subcontract contained a provision similar to that involved in the *Severin* case. *James Stewart & Co.* v. *United States*, 105 C. Cls. 284, 331; *Continental Illinois National Bank, et al.* v. *United States*, 112 C. Cls. 563; *Pearson, Dickerson, Inc., et al.* v. *United States*, 115 C. Cls. 236, 264. Significantly, Judge Madden, who wrote the opinion for the majority in the *Severin* case, now expresses the opinion that those decisions are contrary to the decision of this Court in the *Blair* case and should be overruled. He has been joined in this view by Judge Howell. See R. 125-126. See also *Continental Illinois National Bank, et al.* v. *United States*, 112 C. Cls. 563, 567-569.

The denial of certiorari in the *Severin* case, *supra*, should not be taken as approval of the Court of Claims decision in that case. It has long been established that denial of certiorari is not the equivalent of affirmance of the decision of the court below, and involves no expression on the merits of the case. *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 258; *United States* v. *Carver*, 260 U.S. 482, 490. Since this Court had just decided the *Blair* case, *supra*, it may well have believed that it had settled the rule regarding the Government's liability for a subcontractor's losses and that there was no occasion to reiterate it in the *Severin* case. Since that time, as shown above, the Court of Claims has shown uncertainty as to the effect of the rule laid down in the *Blair* case. Petitioner therefore submits that this uncertainty should be resolved.

3. The question presented is one of considerable public importance. Much work covered by Government contract is subcontracted. The subcontract provision involved in

the present case is not uncommon. In addition the rule implicit in the decision below that damages cannot be recovered against the Government without in turn establishing liability by the prime contractor to the subcontractor is one that potentially affects every subcontract under a Government contract.

4. Such a rule is unworkable and unjust. No prime contractor is going to admit liability to his subcontractor in a suit against the Government and take the risk that if unsuccessful his admission may be used against him in an action by the subcontractor. Thus the Government would be permitted to violate its contracts but escape liability for its wrongful acts.

Had the grading and excavation work been performed by the prime contractor there is no doubt but that the Government would have been liable for the increased costs of that work resulting from its breach of contract. Likewise, it is clear that the Court of Claims would have permitted recovery of such costs in behalf of the subcontractor if the subcontract had not contained the clause in question. See dissenting opinion of Judge Madden in *Continental Illinois National Bank, et al.* v. *United States,* 112 C. Cls. 563, 568. It is only equitable that in the present case the Government should also be held liable for the same losses resulting from the same breach as in the two preceding situations. To hold otherwise is to make the Government's liability dependent upon the accidental factor of the presence or absence of a subcontract provision rather than upon the natural consequences of the Government's breach.

Conclusion

It is respectfully submitted, for the reasons stated above, that this petition for a writ of certiorari should be granted.

HARRY D. RUDDIMAN,
JOHN W. GASKINS,
Attorneys for Petitioner.

April 1952.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Contract provisions involved	2
Statement	5
Argument	6
Conclusion	10

CITATIONS

Cases:

Continental Illinois Nat. Bank v. *United States*, 112 C. Cls. 563	6, 7
Crook Co. v. *United States*, 270 U. S. 4	9
Hunt v. *United States*, 257 U. S. 125	7, 8
James Stewart & Co. v. *United States*, 105 C. Cls. 284	6
Merritt v. *United States*, 267 U. S. 338	7
Pearson, Dickerson, Inc. v. *United States*, 115 C. Cls. 236	6
Perry v. *United States*, 294 U.S. 330	7
Severin v. *United States*, 99 C. Cls. 435, certiorari denied, 322 U. S. 733	6
United States v. *Blair*, 321 U. S. 730	7, 8
United States v. *Foley Co.*, 329 U. S. 64	9
United States v. *Moorman*, 338 U. S. 457	8
United States v. *Rice*, 317 U. S. 61	9
United States v. *Wunderlich*, 342 U. S. 98	8

Miscellaneous:

Williston on *Contracts* (1937), Section 1338	6

In the Supreme Court of the United States

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CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY, AS EXECUTOR OF THE ESTATE OF ALFRED N. SEVERIN, DECEASED, ETC., PETITIONER

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 118-124) is reported at 101 F. Supp. 755.

JURISDICTION

The judgment of the Court of Claims was entered on January 8, 1952 (R. 125). The petition for a writ of certiorari was filed on April 7, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a prime contractor under a standard form construction contract with the United States may recover, on behalf of his subcontractor, damages for delay following upon authorized changes made by the Government in the contract, although the prime contractor is not liable to the subcontractor for the delay.

CONTRACT PROVISIONS INVOLVED

The prime contract with the United States contained the following provisions (R. 89, 111):

> Art. 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined, as provided in article 15 hereof. But nothing provided in this article shall excuse the con-

tractor from proceeding with the prosecution of the work so changed.

Art. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

Art. 9. *Delays—Damages.* * * * If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor

and his sureties shall be liable for the amount thereof: *Provided,* That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further,* That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

The contract between the prime and subcontractor contained the following provision (R. 110):

> 23rd. The contractor or subcontractor shall not in any event be held responsible for any loss, damage, detention or delay caused by the

owner or any other subcontractor upon the building; or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, or by any other cause beyond the control of contractor or subcontractor, or in any event for consequential damages.

STATEMENT

This case arises out of the performance of a government contract for the construction of a housing project in Atlanta, Georgia, completed in March 1937 (R. 80-81, 111). Suit was instituted by the contractor in March 1943 to recover, among other things, for alleged damages caused by delays of the Government following upon authorized changes in the contract (R. 1-8). Although the complaint alleges that "no person other than the plaintiffs is the owner * * * or interested" in the claim (R. 8), the claim in fact included losses claimed by a subcontractor which the contractor agreed to pay over to the subcontractor, if recovered (R. 69, 71, 110).

The prime contract contained the customary clauses permitting "the contracting officer * * * at any time" to make changes "within the general scope" of the contract (R. 89-90), and providing for extensions of time to complete the contract in the event of delays, including delays of the Government, for which the contractor was not responsible (R. 111-112). By specific provision of the sub-

contract the prime contractor was protected against liability to the subcontractor for delays of the Government (R. 110, 122-123).

The Court of Claims allowed the prime contractor to recover for its own damages resulting from what it found to be excessive time consumed by the Government in the redesign of the boiler house (R. 121), but held that the prime contractor could not recover on behalf of the subcontractor for the reason that it was "under no liability to the subcontractor for losses suffered by the latter as a consequence of delays caused by the Government" (R. 123).

ARGUMENT

1. The decision below is in accord with the consistent rulings of the Court of Claims that a contractor with the United States can recover only his own damages and, therefore, cannot sue for losses suffered by a subcontractor in circumstances where he is not liable to the subcontractor. *Severin* v. *United States,* 99 C. Cls. 435, 442-444, certiorari denied, 322 U.S. 733; *James Stewart & Co.* v. *United States,* 105 C. Cls. 284, 330-331; *Continental Illinois Nat. Bank* v. *United States,* 112 C. Cls. 563; *Pearson, Dickerson, Inc.* v. *United States,* 115 C. Cls. 236, 264. The fundamental principle of damages in contracts between private parties is compensation for actual loss. See Williston on *Contracts* (1937), § 1338. Application of this principle of private contract law would therefore pre-

clude the contractor's recovery where, as here, he has suffered no injury.

Just as in suits between private parties, the plaintiff in an action against the United States for breach of contract "can recover no more than the loss he has suffered and of which he may rightfully complain." See *Perry* v. *United States,* 294 U.S. 330, 354. But, in the case of the United States, the attempt to secure more than the plaintiff's own damages meets additional obstacles. The absence of Congressional consent prevents the subcontractor from maintaining a suit in his own behalf. *Merritt* v. *United States,* 267 U.S. 338, 340. Obviously, Congress has not consented to the circumvention of this fundamental jurisdictional barrier by the subterfuge of permitting the contractor to sue for the subcontractor's benefit. See *Continental Illinois Nat. Bank* v. *United States,* 112 C. Cls. at 566. Any damages resulting from actionable conduct of the United States for which the prime contractor is answerable to the subcontractor are, of course, recoverable as a part of the prime contractor's own losses. But he cannot recover for losses which he does not suffer.

2. The well-settled rule of the Court of Claims, applied in the instant case, is not in conflict with *United States* v. *Blair,* 321 U.S. 730, as asserted by petitioner. The *Blair* case expressly followed the principle announced in *Hunt* v. *United States,* 257 U.S. 125, that a contractor may recover the reasonable value of services required by the Government

in addition to those called for in the contract, even where performed by a subcontractor, because "the obligation to pay for that service was to him, whether he performed it personally or through another" (257 U.S. at 129).

There is a plain distinction between requiring the Government to pay for extra services demanded and received by the United States, as in the *Hunt* and *Blair* cases, and denying recovery to a contractor, as in the present case, for damages which he has admittedly not suffered while providing no greater performance than the original contract contemplated.

It is significant, moreover, that the contracting officer in the *Blair* case "finally rendered a decision in favor of the respondent [the contractor] and the subcontractor" (p. 737). Article 15 of the contract required all disputes arising under it to be submitted for final administrative decision to the contracting officer subject to appeal to the head of the agency. Since the administrative decision was favorable to the contractor, this provided an adequate basis for his recovery. *United States* v. *Wunderlich,* 342 U.S. 98; *United States* v. *Moorman,* 338 U.S. 457.

3. As a final matter, regardless of whether in other circumstances a contractor may sue the United States on behalf of his subcontractor, recovery is prohibited in the present case by the decisions of this Court holding the Government not liable for damages resulting from delay. See, e.g.,

United States v. *Rice,* 317 U.S. 61; *Crook Co.* v. *United States,* 270 U.S. 4; *United States* v. *Foley Co.,* 329 U.S. 64.[1] The principal delay for which damages are sought here occurred in connection with the redesign of the boiler house and stack pursuant to the standard contract provisions permitting change orders. The Court of Claims held that the Government delayed more than a reasonable time after stoppage of the work in issuing the change order and was liable to the prime contractor, but not to the subcontractor, for damages flowing from this undue delay. The decisions of this Court denying recovery for delays caused by the Government afford no basis for distinguishing among varying degrees of delay. They rest on the view "that contracts such as this do not bind the Government to have the property ready for work by a contractor at a particular time" (*United States* v. *Rice,* 317 U.S. at 65), and "that changes and delays were anticipated and provided for." *United States* v. *Foley Co.,* 329 U.S. at 69. The provision for delays caused by the Government in the present contract was for an extension of the contractor's time of performance. An extension of time was granted. This constituted the exclusive relief under the contract.

[1] Though this principle, in the Government's view, should have been applied to deny recovery to the prime contractor in this case, the Government has not sought review of the award to the prime contractor.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1952.

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